

INDEX

Opinions below.....	Page
Jurisdiction.....	1
Question presented.....	1
Statutes involved.....	2
Statement.....	2
Summary of argument.....	4
Argument.....	7
I. Federal law properly governs the determination whether a state-created lien has been suffi- ciently perfected to defeat a federal tax lien....	8
II. The federal tax lien has priority over an earlier- arising general state tax lien which has not attached to specific property.....	10
A. Under the controlling decisions of this Court, the State of Vermont's tax lien was not sufficiently perfected to defeat the federal tax lien, since it had not at- tached to specific property when the federal lien arose.....	10
B. The principles which this Court has ap- plied under the federal insolvency stat- ute for determining whether a state- created lien is perfected or choate are equally applicable when the federal priority is asserted under the lien pro- visions of the Internal Revenue Code....	12
Conclusion.....	21
Appendix.....	23

CITATIONS

Cases:

<i>Clearfield Trust Co. v. United States</i> , 318 U.S. 363.....	8
<i>Conard v. Atlantic Insurance Co.</i> , 1 Pet. 386.....	13
<i>Crest Finance Co. v. United States</i> , 368 U.S. 347.....	11
<i>Glass City Bank v. United States</i> , 320 U.S. 265.....	20
<i>Illinois v. Campbell</i> , 329 U.S. 362.....	5, 11, 14, 15

(1)

Cases—Continued

	Page
<i>Meyer v. United States</i> , 375 U.S. 233.....	9
<i>Michigan v. United States</i> , 317 U.S. 338.....	20
<i>Nathanson v. National Labor Relations Board</i> , 344 U.S. 25.....	16
<i>New York v. MacKay</i> , 288 U.S. 290.....	14
<i>Spokane County v. United States</i> , 279 U.S. 80.....	13-14
<i>United States v. Aeri</i> , 348 U.S. 211.....	10
<i>United States v. Allegheny County</i> , 322 U.S. 174.....	8
<i>United States v. Ball Construction Co.</i> , 355 U.S. 587, reversing per curiam, 239 F. 2d 384.....	10-11
<i>United States v. Bradley</i> , 321 F. 2d 224.....	13
<i>United States v. Brozman</i> , 363 U.S. 237.....	8-9
<i>United States v. Buffalo Sav. Bank</i> , 371 U.S. 223.....	11
<i>United States v. Colotta</i> , 350 U.S. 808, reversing per curiam, 224 Miss. 33, 79 So. 2d 474.....	10
<i>United States v. Gilbert Associates</i> , 345 U.S. 361.....	15
<i>United States v. Hulley</i> , 358 U.S. 66, reversing per curiam, 102 So. 2d 590.....	11
<i>United States v. Liverpool & London Ins. Co.</i> , 348 U.S. 215.....	10
<i>United States v. New Britain</i> , 347 U.S. 81.....	4,
	5, 6, 8, 10, 11, 12, 17-19, 20
<i>United States v. Pioneer American Ins. Co.</i> , 374 U.S. 84.....	5,
	7, 8, 11, 19-20
<i>United States v. Scovil</i> , 348 U.S. 218.....	10
<i>United States v. Security Tr. & Sav. Bk.</i> , 340 U.S. 47.....	6,
	8, 10, 16, 18, 20
<i>United States v. Snyder</i> , 149 U.S. 210.....	20
<i>United States v. State Bank of North Carolina</i> , 6 Pet. 29.....	6, 16
<i>United States v. Texas</i> , 314 U.S. 480.....	14
<i>United States v. Union Central Life Ins. Co.</i> , 368 U.S. 291.....	20
<i>United States v. Vorreiter</i> , 355 U.S. 15, reversing per curiam, 134 Colo. 543, 307 P. 2d 475.....	10
<i>United States v. Waddill, Holland & Flinn, Inc.</i> , 323 U.S. 353.....	14, 15
<i>United States v. White Bear Brewing Co.</i> , 350 U.S. 1010, reversing per curiam, 227 F. 2d 359.....	10
<i>Weitz v. Electrovation, Inc.</i> , 48 Wash. 2d 604, 295 P. 2d 728.....	13

III

Statutes:

Internal Revenue Code of 1954:		Page
Sec. 6321 (26 U.S.C. 6321).....		12, 23
Sec. 6322 (26 U.S.C. 6322).....		12, 23
Sec. 6323 (26 U.S.C. 6323).....		23
Sec. 6323(a) (26 U.S.C. 6323(a)).....		23
Revised Statutes, Sec. 3486 (31 U.S.C. 191) -	4, 6, 10, 11, 24	
8 Vermont Statutes Annotated (1959 Rev.), Title 32:		
Sec. 5765.....		2, 24
Sec. 5767.....		9, 25

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 509

UNITED STATES OF AMERICA, PETITIONER

v.

VERMONT, ET AL.

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT**

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the district court (R. 19-27) is reported at 206 F. Supp. 951. The opinion of the court of appeals (R. 29-43) is reported at 317 F. 2d 446.

JURISDICTION

The judgment of the court of appeals was entered on May 9, 1963 (R. 44). On July 3, 1963, the court of appeals (1) granted a motion of the United States for leave to file a petition for rehearing out of time (R. 44-45), and (2) denied the petition (R. 46-57, 58). The petition for a writ of certiorari was filed on September 30, 1963, and was granted on December 9, 1963 (R. 58; 375 U.S. 940). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

(1)

QUESTION PRESENTED

Whether a general tax lien of the State of Vermont upon all of a taxpayer's property, which arises upon assessment of the tax but does not attach to specific property, is subordinate to a subsequently-arising federal tax lien.

STATUTES INVOLVED

The pertinent provisions of the Internal Revenue Code of 1954 and the Vermont Statutes Annotated are set forth in the Appendix, *infra*, pp. 23-25.

STATEMENT

On October 21, 1958, the State of Vermont made an assessment and demand on Cutting & Trimming, Inc. for state income taxes of \$1,628.15 which the company had withheld from wages paid to its employees (R. 17, 30).¹ The pertinent Vermont statute (32 V.S.A. Section 5765, App., *infra*, p. 24) provides that if an employer who is required to deduct and withhold a tax from an employee's wages fails to pay the same after demand, "the amount, including interest after such demand, together with any costs that may accrue in addition thereto, shall be a lien in favor of the state of Vermont upon all property and rights to property, whether real or personal, belonging to such employer," and further that "Such lien shall arise at the time the assessment and demand is made by the commissioner of taxes and shall continue until the liability for such sum, with interest and costs, is satisfied or becomes unenforceable."

¹ On October 30, 1958, it filed with the City Clerk of Burlington a notice of lien for such taxes (R. 17, 30).

On May 21, 1959, the State instituted suit in a state court against Cutting & Trimming and Chittenden Trust Company, a Vermont bank in which Cutting & Trimming had \$1,878.82 on deposit, of which \$600 had already been attached by Rainbow Children's Dress Company (R. 10-11, 30-31). On October 23, 1959, the State court entered judgment for Vermont against Cutting & Trimming for \$4,049.22 (which included other tax assessments not here relevant), and against Chittenden Trust Company for \$1,278.82 (R. 11, 31).

Prior to the filing of the State court suit—but subsequent to the State's assessment and demand—the Commissioner of Internal Revenue on February 6, 1959, made an assessment of \$5,365.96 against Cutting & Trimming for 1958 taxes under the Federal Unemployment Tax Act (R. 6, 31).² In 1961, the United States brought the present action against Cutting & Trimming, the State of Vermont, and others, to establish Cutting & Trimming's tax liability, and to foreclose its tax lien against the property of Cutting & Trimming held by the trust company (R. 5-8). The answer of the State of Vermont alleged that the October 21, 1958, assessment gave its lien priority over the federal lien (R. 8-12). On the United States' motion for judgment on the pleadings (R. 14-16), the district court held that the State of Vermont's tax lien had priority over the federal lien, and directed the trust company to apply the \$1,878.82 first to the

² On June 2, 1959, the Commissioner served a notice of lien and levy upon Chittenden Trust Company (R. 13). Shortly before, on May 25, 1959, the State of Vermont had served a writ of attachment on the bank (*ibid.*).

4
payment of principal and interest on the State's tax lien, and to pay any balance to the United States (R. 19-27).

The court of appeals affirmed (R. 44). The court ruled that under the standards which this Court has applied for determining the relative priority of federal claims and State tax liens under Section 3466 of the Revised Statutes (now 31 U.S.C. 191) where the taxpayer is insolvent, the general lien of the State of Vermont upon all the taxpayer's property was not sufficiently perfected to prevail over the federal tax claim (R. 33); that a different standard for determining whether the State lien is perfected applies, however, when the federal priority is asserted under the lien provisions of the Internal Revenue Code against a non-insolvent taxpayer (R. 33-43); and that under this Court's decision in *United States v. New Britain*, 347 U.S. 81, "[i]t would seem that if the general federal tax lien under §§ 6321 and 6322 is thus sufficiently 'choate' to prevail over a later specific local tax lien, a general state tax lien under an almost identically worded statute must also be 'choate' enough to prime a later and equally general federal tax lien under Chief Justice Marshall's 'cardinal rule' of 'first in time, first in right', in the absence of contrary direction by Congress" (R. 39).

SUMMARY OF ARGUMENT

I

This Court should follow the settled principle that federal rather than State law controls in determining when a State tax lien "has become so perfected as

to defeat a later-arising or later-filed federal tax lien" (*United States v. Pioneer American Insurance Co.*, 374 U.S. 84, 88). Since the federal lien is created and defined by a federal statute, and since its scope and effectiveness directly affect the revenues that the federal government can collect, it is federal law which determines its incidents.

II

A. This Court has repeatedly and consistently held that State-created liens do not have priority over a subsequently accruing federal tax lien unless, at the time the latter arose, the State lien was already perfected or choate. A State lien is not choate as against a federal tax lien unless "[1] the identity of the lienor, [2] the property subject to the lien, and [3] the amount of the lien are established." *United States v. New Britain*, 347 U.S. 81, 84, quoted with approval in *United States v. Pioneer American Insurance Co.*, 374 U.S. 84, 89. The second requirement for choateness—the establishment of "the property subject to the lien"—requires that "[t]he lien must attach to specific property of the debtor" (*Illinois v. Campbell*, 329 U.S. 362, 373). Under these principles, the Vermont lien was not choate when the federal lien attached. Although the State lien had come into being when the State assessed and demanded the tax—which was prior to the federal lien—the State's lien was not then perfected because it had not attached to specific property of Cutting and Trimming but was only a general lien upon all of that company's property.

B. The foregoing principles are equally applicable when the federal priority rests upon the lien provisions of the Internal Revenue Code rather than upon the federal insolvency statute (Section 3466 of the Revised Statutes), under which this Court developed the choateness test for State liens. In the five cases in which the test was developed, the Court held that, although a State tax lien on all of a taxpayer's property was valid against other State-created interests, it was not sufficiently perfected to defeat the priority which Section 3466 gave to the federal government in insolvency. The basic purpose of the priority under Section 3466—"to secure an adequate revenue to sustain the public burdens, and discharge the public debts" (*United States v. State Bank of North Carolina*, 6 Pet. 29, 35)—also underlies and explains the lien system which Congress has provided for the collection of federal taxes, and the same standards of choateness should prevail under both provisions. This Court unanimously so held in *United States v. Security Trust & Savings Bank*, 340 U.S. 47, 51, on the ground that the choateness test was necessary in determining priority between State liens and federal tax liens "if the purpose of the federal tax lien statute to insure prompt and certain collection of taxes due the United States from tax delinquents is to be fulfilled." In *United States v. New Britain*, 347 U.S. 81, 86, the Court reaffirmed its holding in *Security Trust* that the choateness principle applies in determining the relative priority of federal tax liens and State-created liens, and also made it clear that a local tax lien is not sufficiently perfected to defeat a federal lien un-

less, at the time the latter arose, the State lien had already become choate in the sense that it was "certain as to amount, identity of the lienor [and] the property subject thereto." The seeming anomaly that a federal tax lien is perfected even though it is a general lien but that a similar State tax lien is unperfected because it has not attached to specific property, merely reflects the priority which the federal lien has been given in order to protect the federal revenue.

ARGUMENT

The issue in this case is whether a general tax lien of the State of Vermont upon all of a taxpayer's property, which arises upon assessment of the tax, is subordinate to a subsequently-arising federal tax lien because, when the federal lien arose, the State lien was not perfected or choate since it had not attached to specific property.

As this Court frequently has held, and repeated only last Term in *United States v. Pioneer American Insurance Co.*, 374 U.S. 84, 88, "it is a matter of federal law when such a lien has acquired sufficient substance and has become so perfected as to defeat a later-arising or later-filed federal tax lien." Respondent State of Vermont urges (Answer to Pet. for Cert., pp. 4-5), however, that this rule should no longer be followed, and that State rather than federal law should henceforth control the determination whether a State-created lien is sufficiently perfected to prevail over a federal tax lien. We shall show, *first*, that the rule making federal law controlling in this field is correct and should be followed, and, *second*, that under

the controlling federal principles the federal tax lien in this case primes the State's lien.

I

FEDERAL LAW PROPERLY GOVERNS THE DETERMINATION WHETHER A STATE-CREATED LIEN HAS BEEN SUFFICIENTLY PERFECTED TO DEFEAT A FEDERAL TAX LIEN

The federal tax lien is created and defined by a federal statute which Congress passed in the exercise of its constitutional power to lay and collect taxes. Its scope and effectiveness directly affect the amount of revenue that the federal government can collect. Under well settled principles, therefore, federal rather than State law determines its incidents. See, *e.g.*, *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-367; *United States v. Allegheny County*, 322 U.S. 174, 182-183. "The effect of a lien in relation to a provision of federal law for the collection of debts owing the United States is always a federal question" (*United States v. Security Trust & Savings Bank*, 340 U.S. 47, 49). "Otherwise, a State could affect the standing of federal liens, contrary to the established doctrine, simply by causing an inchoate lien to attach at some arbitrary time even before the amount of the tax, assessment, etc., is determined" (*United States v. New Britain*, 347 U.S. 81, 86, quoted with approval in *Pioneer American*, *supra*, at 88-89).

The State relies on *United States v. Brosnan*, 363 U.S. 237, 241, where this Court, in determining whether concededly junior federal tax liens had been divested from specific property by state mortgage foreclosure procedures, "adopt[ed] as federal law state law." In so doing, however, the Court expressly

pointed out (p. 240) that since "Federal tax liens are wholly creatures of federal statute" which provides "[d]etailed provisions govern[ing] their creation, continuance, validity, and release * * * matters directly affecting the nature or operation of such liens are federal questions, regardless of whether the federal statutory scheme specifically deals with them or not." The Court, however, declined to adopt an independent federal standard governing divestiture of junior federal tax liens because it would "inject ourselves into the network of competing private property interests, by displacing well-established state procedures governing their enforcement, or superimposing on them a new federal rule" (p. 242).

The considerations which led the Court to look to state law in the *Brosnan* case are plainly inapplicable here. The issue here is not the procedure for the enforcement of federal liens, but the substantive question of their priority.³ Applying the settled federal rule that a State-created lien does not prime a federal tax lien unless the State lien is perfected or choate when the federal lien arises would neither clash with any "competing private property interests" nor displace "well-established state procedures governing their enforcement."⁴

³ We read this Court's reliance on *Brosnan* in its recent decision in *Meyer v. United States*, 375 U.S. 233, 238-239, as reflecting its view that the application of the doctrine of marshaling of assets similarly involved a question of the enforcement of federal liens.

⁴ The State of Vermont may here enforce its tax liens against specific property by the procedures provided by State statute, i.e., a foreclosure suit against specific real property, a sale of personal property, or, as here, a suit against the taxpayer aided by attachment of specific property. See 8 Vermont Statutes Annotated (1959 Rev.), Title 32, Sec. 5767, App. *infra*, p. 25.

The State would remain free to define, as between itself and the property interests which it creates, the respective priority of such interests. Continued application of federal law in this field would affect only the relations between the States and the federal government—an area in which, under the Supremacy Clause of the Constitution, the federal interest is paramount.

II

THE FEDERAL TAX LIEN HAS PRIORITY OVER AN EARLIER-ARISING GENERAL STATE TAX LIEN WHICH HAS NOT ATTACHED TO SPECIFIC PROPERTY

A. UNDER THE CONTROLLING DECISIONS OF THIS COURT, THE STATE OF VERMONT'S TAX LIEN WAS NOT SUFFICIENTLY PERFECTED TO DEFEAT THE FEDERAL TAX LIEN, SINCE IT HAD NOT ATTACHED TO SPECIFIC PROPERTY WHEN THE FEDERAL LIEN AROSE

In 1950 this Court, applying the principles which it had developed in holding that a general State tax lien upon all of a taxpayer's property was not sufficiently perfected to defeat the priority which Section 3466 of the Revised Statutes (now 31 U.S.C. 191) gave in insolvency to all debts due to the United States (including taxes), ruled that a State-created lien does not have priority over a subsequent federal tax lien unless, at the time the federal tax lien accrued, the State lien was already perfected or "choate." *United States v. Security Trust & Savings Bank*, 340 U.S. 47. Since that decision, the Court has repeatedly and consistently denied State-created liens which did not satisfy the federal standard of perfection or choateness priority over subsequently-attaching federal tax liens.* Only last Term, in

* *United States v. New Britain*, 347 U.S. 81; *United States v. Acri*, 348 U.S. 211; *United States v. Liverpool & London*

United States v. Pioneer American Insurance Co., 374 U.S. 84, 88, the Court reiterated and reapplied the principle that State-created liens "take priority over later federal tax liens" only if, when the federal liens arose, the State liens were already "choate."

A State lien is not choate as against a federal tax lien, however, unless and until three conditions have been satisfied: "when [1] the identity of the lienor, [2] the property subject to the lien, and [3] the amount of the lien are established." *United States v. New Britain*, 347 U.S. 81, 84, quoted with approval in *Pioneer*, *supra*, at 89. The second requirement for choateness—the establishment of "the property subject to the lien"—requires that "[t]he lien must attach to specific property of the debtor." *Illinois v. Campbell*, 329 U.S. 362, 373. In the *Campbell* case a State tax lien upon all of a taxpayer's property was held to be "not so specific and perfected as to defeat the priority of [the tax claim of] the United States" under Section 3466 of the Revised Statutes, even though the State had already secured the appointment of a receiver of the insolvent taxpayer's property at the time the federal lien attached.

There can be no doubt that, under the foregoing principles, the Vermont lien was not choate when

Ins. Co., 348 U.S. 215; *United States v. Scovil*, 348 U.S. 218; *United States v. Colotta*, 350 U.S. 808, reversing *per curiam*, 224 Miss. 33, 79 So. 2d 474; *United States v. White Bear Brewing Co.*, 350 U.S. 1010, reversing *per curiam*, 227 F. 2d 359 (C.A. 7); *United States v. Vorreiter*, 355 U.S. 15, reversing *per curiam*, 134 Colo. 543, 307 P. 2d 475; *United States v. Ball Construction Co.*, 355 U.S. 587, reversing *per curiam*, 239 F. 2d 384 (C.A. 5); *United States v. Hulley*, 358 U.S. 66, reversing *per curiam*, 102 So. 2d 599 (Fla.); *Crest Finance Co. v. United States*, 368 U.S. 347; *United States v. Buffalo Sav. Bank*, 371 U.S. 228.

the federal lien attached. While the Vermont lien came into being when the State assessed and demanded the tax—which was prior to the federal tax lien*—the State's lien was not then perfected because it had not attached to specific property of Cutting & Trimming, but was only a general lien upon all of that company's property. Although the State of Vermont subsequently took steps to perfect its lien by attaching the bank account in question, such suit was not instituted until after the federal tax lien had arisen and had been recorded. Thus, when the federal lien arose, the State lien did not meet one of the three essential elements of a choate lien: that it attach to specific property.

B. THE PRINCIPLES WHICH THIS COURT HAS APPLIED UNDER THE FEDERAL INSOLVENCY STATUTE FOR DETERMINING WHETHER A STATE-CREATED LIEN IS PERFECTED OR CHOATE ARE EQUALLY APPLICABLE WHEN THE FEDERAL PRIORITY IS ASSERTED UNDER THE LIEN PROVISIONS OF THE INTERNAL REVENUE CODE

The court of appeals, although recognizing that the State of Vermont's general lien upon all of the taxpayer's property was not sufficiently perfected to defeat the federal lien under the federal insolvency statute (R. 33), concluded that a different rule applies when the federal priority is asserted under the lien provisions of the Internal Revenue Code. It reasoned that if, as *United States v. New Britain*, 347 U.S. 81, 84, teaches, the federal lien upon all of a taxpayer's property is "perfected in the sense that there is nothing more to be done to have a choate lien," a

*The State's assessment and demand was made on October 21, 1958 (R. 30); the federal lien arose on February 6, 1959, when the federal taxes were assessed (R. 6, 31). Sections 6321 and 6322, Internal Revenue Code of 1954, App., *infra*, p. 23.

State lien upon all of a taxpayer's property is similarly perfected.' This conclusion fails to give appropriate weight to the underlying rationale of the decisions of this Court in which the choateness test was developed, and to the basic Congressional policy of protecting federal revenues which that doctrine is designed to implement.

In the first case under the insolvency statute in which the choateness doctrine was applied (*Spokane County v. United States*, 279 U.S. 80), the question was whether State taxes assessed against an insolvent prior to the appointment of a receiver, and which under State law constituted a lien upon all the taxpayer's property, had priority over taxes due to the United States, but not yet assessed. The State contended that the priority which Section 3466 gave to debts due to the United States did not apply as against a secured claimant (see 279 U.S. at 81). The Court found it unnecessary to decide this question, however. It ruled that since the State had not taken the necessary statutory steps to perfect its assessment lien (i.e., "seizure, distraint or other specific proceedings," 279

' The decision below is in accord with that of the only other federal appellate court that has decided the question. *United States v. Bradley*, 321 F. 2d 224 (C.A. 5). It is in conflict, however, with *Weitz v. Electrovation, Inc.*, 48 Wash. 2d 604, 295 P. 2d 728. There the Supreme Court of Washington held that the State's tax and other liens, which attached to all of the taxpayer's property upon assessment, but which the State had not enforced "by distraint or levy of execution" (48 Wash. 2d at 609, 295 P. 2d at 731), had not "become specific and perfected prior to the effective date of the Federal liens" (48 Wash. 2d at 610, 295 P. 2d at 732) so as to defeat the latter.

* The doctrine was perhaps foreshadowed by Mr. Justice Story's questioning in *Conard v. Atlantic Insurance Co.*, 1 Pet. 386, 441, whether the federal insolvency priority would divest "a specific lien attached to a thing."

U.S. at 93-94), its claim could not prevail over the priority which Section 3466 gave to the unsecured federal tax claims. The Court quoted with approval the following statement of the concurring judge in the state court: "[N]either the United States, the state of Washington nor Spokane County for the state of Washington has ever, by the prescribed statutory procedure, perfected its inchoate tax lien right against any of the property of which the funds here in question are the proceeds" (279 U.S. at 94).

Four years later, in *New York v. Macloy*, 288 U.S. 290, the Court again found it unnecessary to decide whether "a perfected lien upon the property of the insolvent at the date of the receivership" would have priority under Section 3466 over a federal claim for taxes, since it again held that a State's tax liens upon all property of the taxpayer were "not so perfected or specific as to change the rule of distribution" (288 U.S. at 292). In *United States v. Texas*, 314 U.S. 480, *United States v. Waddill, Holland & Flinn, Inc.*, 323 U.S. 353, and *Illinois v. Campbell*, 329 U.S. 362, the Court similarly held that liens for State or local taxes which arose upon assessment but which had not been further perfected were not sufficiently perfected to require resolution of the question whether a choate State lien would defeat the federal priority in insolvency. And, as noted above, the reason why the general local liens were held not perfected in *Campbell* was because they had not "attach[ed] to specific property of the debtor" (329 U.S. at 373).*

* Similarly, in the *Waddill* case the Court held that until a City had taken steps to perfect its lien by distraining specific property, the lien was not "so explicit and perfected" (323

In sum, the rationale of the cases in which the choateness test was developed was that a general State or local tax lien upon all of a taxpayer's property, although valid against other State-created interests, was not valid against the claims of the Federal Government. As against such claims, which were given priority by the insolvency statute, the State lien was ineffective to give the State any position other than that of a general unsecured creditor. It is difficult to see why the result should be any different where the federal claim to priority rests upon the tax lien statute rather than upon the insolvency statute, and where the federal government is a secured rather than an unsecured creditor. Indeed, it would be most anomalous if a general State lien was viewed as not sufficiently perfected to have priority over an unsecured federal debt (which was the status of the tax claims involved in the solvency cases) but nevertheless was sufficiently perfected to prevail over a secured tax claim.

The basic purpose of the priority which Section 3466 grants in insolvency to debts due to the United States is "to secure an adequate revenue to sustain

U.S. at 360) as to defeat the federal priority. *Waddill* also involved a landlord's lien, which the Court held was "neither specific nor perfected," since it gave him "only a general power over unspecified property rather than an actual interest in a definitive portion or portions thereof" (p. 357).

In *United States v. Gilbert Associates*, 345 U.S. 361, 366, the Court, following the *Campbell* and *Waddill* cases, again held that since a town's general tax lien had not "attached to certain property by reducing it to possession," the town had "only a general, unperfected lien" which did not defeat the priority of a federal tax claim under Section 3466, even though the town's general lien had arisen before notice of the federal tax was filed.

the public burdens, and discharge the public debts" (*United States v. State Bank of North Carolina*, 6 Pet. 29, 35, quoted with approval in *Nathanson v. National Labor Relations Board*, 344 U.S. 25, 28). The lien system which Congress has provided for the collection of federal taxes similarly "reveal[s] a purpose to assure the collection of [federal] taxes" (*Glass City Bank v. United States*, 326 U.S. 265, 267). It was, therefore, not surprising that, when this Court faced the question whether the choateness test which it had enunciated in the cases under Section 3466 was also applicable in determining priority between a State-created lien and a federal tax lien arising under the Internal Revenue Code, it unanimously held that it was. In *United States v. Security Trust and Savings Bank*, 340 U.S. 47, the Court held that since a creditor's attachment lien was merely "contingent or inchoate" (p. 50) because it would not be perfected until the creditor had obtained a judgment, it was junior to a federal tax lien which had arisen and been recorded subsequent to the date of the attachment lien but prior to the date the attaching creditor obtained judgment. The Court stated (340 U.S. at 51, emphasis added):

In cases involving a kindred matter, i.e., the federal priority under R.S. § 3466, it has never been held sufficient to defeat the federal priority merely to show a lien effective to protect the lienor against others than the Government, but contingent upon taking subsequent steps for enforcing it. *Illinois v. Campbell, supra*, 374. If the purpose of the federal tax lien

*statute to insure prompt and certain collection of taxes due the United States from tax delinquents is to be fulfilled, a similar rule must prevail here. * * **

In *United States v. New Britain*, 347 U.S. 81, 86, the Court held that in determining the relative priority of federal tax liens and a City's lien for delinquent real estate taxes and water rent, "the priority of each statutory lien contested here must depend on the time it attached to the property in question and became choate." The competing liens in that case were on real property. The federal liens arose at various times between April 1948 and September 1950; the City's liens had "attached to the specific real estate" at various dates from 1947 through 1951. The Court, although noting that a State's characterization of a lien as "specific and perfected * * *" is not, of course, conclusive against the Federal Government," accepted the holding of the Supreme Court of Errors of Connecticut that the City's liens had the requisite specificity, "since they attached to specific pieces of real property for the taxes assessed and water rent due" (p. 84). It ruled (*ibid.*) that "[t]he federal tax liens are general and * * * perfected" "in the sense that there is nothing more to be done to have a choate lien—when the identity of the lienor, the property subject to the lien, and the amount of the lien are established"; and that the City's "specific statutory liens" were similarly perfected. The Court held (p. 85), however, that it did not follow from the fact that the City's liens were perfected that they "must receive priority as a whole." On the contrary, it

ruled (pp. 86-87) that the priority of each lien depended upon when it "became choate"; and that since "certain of the City's tax and water-rent liens apparently attached to the specific property and became choate prior to the attachment of the federal tax liens," it remanded the case for determination of the respective priorities of the various liens in accordance with the principle that, as between liens of equal priority, "the first in time is the first in right" (p. 85). The Court pointed out (p. 86) that inchoate State-created liens which become "certain as to amount, identity of the lienor, or the property subject thereto only at some time subsequent to the date the federal liens attach * * * cannot then be permitted to displace such federal liens. Otherwise, a State could affect the standing of federal liens, contrary to the established doctrine, simply by causing an inchoate lien to attach at some arbitrary time even before the amount of the tax, assessment, etc., is determined."

We submit that in *New Britain* the Court did two significant things:

1. It reaffirmed its holding in *Security Trust* that the principle of choateness applies in determining the relative priority of federal tax liens and State-created liens.

2. It made it clear that a local or State tax lien is not sufficiently perfected to defeat a federal lien unless, at the time the federal lien arose, the State lien had already become choate in the sense that it was "certain as to amount, identity of the lienor, [and] the property subject thereto."

The holding in *New Britain* that some of the City's liens had priority over the federal liens rested, we submit, on the fact that, "prior to the attachment of the federal tax liens," the City's liens "became choate" by "attach[ing] to the specific property." Contrary to the view of the court of appeals (R. 39), we do not believe that the opinion may fairly be read as indicating that since the general federal lien is perfected upon assessment of the tax (even though it has not yet then attached to specific property), a State tax lien is similarly perfected when the State tax is assessed. On the contrary, the repeated emphasis in *New Britain* on attachment to specific property as a condition for choateness of a State-created lien demonstrates that the critical factor in that case for determining when the local liens were perfected was the point at which they attached to specific property. Since, in the present case, unlike *New Britain*, the liens of the State of Vermont had not attached to specific property at the time the federal lien arose, they were not then sufficiently perfected to defeat the federal priority.

This interpretation of *New Britain* is, we believe, confirmed by *United States v. Pioneer American Insurance Co.*, 374 U.S. 84. For there this Court, after pointing out that under *New Britain* the priority of the federal tax lien as against State-created liens is governed by the rule of "first in time, first in right," explained that it was "critical, therefore, to determine when competing liens, whether federal- or state-created, come into existence or become valid for the purpose of the rule" (p. 87). It then stated (p. 92)

that in *New Britain* it had "denied priority to local tax liens which were imperfect when the federal tax lien was filed * * *." In other words, the rule of "first in time, first in right" comes into play only if the competing liens are both perfected, and a State-created lien is not "first in time" if, when it arose, it was not yet perfected because it did not satisfy the three requirements of a choate lien.

At first glance it might seem anomalous that, upon assessment of the tax, a federal lien upon all of a taxpayer's property is, without more, choate,¹⁰ but a State lien in the same terms is inchoate because it has not yet attached to specific property. But this seeming anomaly reflects only the fact that, in order to accomplish "the purpose of the federal tax lien statute to insure prompt and certain collection of taxes due the United States from tax delinquents" (*Security Trust, supra*, 340 U.S. at 51), the federal tax lien has been given a priority which similar State tax liens do not enjoy. In short, there is a "double standard" in this area: the federal lien is fully perfected when the tax is assessed, but State liens are not sufficiently perfected to defeat the federal lien unless and until they satisfy the three criteria of choateness which this Court has enunciated. Indeed, the existence of such a double standard was implicit in all of the decisions of this Court which, in order to protect the

¹⁰ The federal tax lien need not be perfected by attachment to specific property, since it is fully perfected when the tax is assessed. See, in addition to *New Britain*, *United States v. Snyder*, 149 U.S. 210; *Michigan v. United States*, 317 U.S. 338; *United States v. Union Central Life Ins. Co.*, 368 U.S. 291; *Glass City Bank v. United States*, 320 U.S. 265.

federal revenue, have denied priority to earlier State-created liens which did not satisfy the federal standard of perfection.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded with a direction to give the federal tax liens priority over the State tax liens.

Respectfully submitted,

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APPENDIX

Internal Revenue Code of 1954:

SEC. 6321. LIEN FOR TAXES.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

(26 U.S.C. 6321.)

SEC. 6322. PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time.

(26 U.S.C. 6322.)

SEC. 6323. VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS.

(a) *Invalidity of Lien without Notice.*—Except as otherwise provided in subsection (c), the lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary or his delegate—

(26 U.S.C. 6323.)

Revised Statutes:

SEC. 3466. Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.

(31 U.S.C. 191.)

8 Vermont Statutes Annotated (1959 Rev.) Title 32:**§ 5765. Amount of withheld taxes as lien against employer**

If any employer required to deduct and withhold a tax under section 5761 of this title neglects or refuses to pay the same after demand, the amount, including interest after such demand, together with any costs that may accrue in addition thereto, shall be a lien in favor of the state of Vermont upon all property and rights to property, whether real or personal, belonging to such employer. Such lien shall arise at the time the assessment and demand is made by the commissioner of taxes and shall continue until the liability for such sum, with interest and costs, is satisfied or becomes unenforceable. Such lien shall be valid as against any subsequent mortgagee, pledgee, purchaser or judgment creditor when notice of such lien and the sum due has been filed by the commissioner of taxes with the clerk of the town or city in which the property subject to the lien is situated, or, in the case of an unorganized town, gore or grant, in the office of the clerk

of the county wherein such property is situated. * * *

§ 5767. Foreclosure of lien

The lien provided for by section 5765 of this title may be foreclosed in the case of real estate agreeably with the provisions of law relating to foreclosure of mortgages on real estate, and in the case of personal property, agreeably with the provisions of law relating to the foreclosure of chattel mortgages.